



IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1584

ROBERT DEWAIN MILL,

Petitioner,

v.

STATE OF ALASKA

Respondent.

**RESPONSE OF THE STATE OF ALASKA
TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALASKA**

AVRUM M. GROSS,
ATTORNEY GENERAL
STATE OF ALASKA

By: David Mannheimer
Assistant Attorney General
941 West Fourth Avenue, Room 209
Anchorage, Alaska 99501
(907) 279-7424
Attorney for Respondent

TABLE OF CONTENTS

Jurisdiction	1
Questions Presented	3
Constitutional Provisions, Statutes and Rules Involved	3
Statement of the Case	4
Reasons for Denying the Writ	6
A. The Alaska Supreme Court, as a Matter of State Law, Determined that Mill's Assault on Vincent Constituted Only One Crime, Not Three	6
B. The Decision of Mill's Case By Three Members of the Court, On a Two to One Vote, Did Not Violate Due Process	10
Conclusion	11
Appendix A — Order Denying Certificate of Federal Question	12

TABLE OF AUTHORITIES

Cases	Page
<i>Bell v United States</i> , 349 U.S. 81 (1955)	8
<i>Bowe v Scott</i> , 233 U.S. 658 (1914)	2
<i>Briscoe v Commonwealth's Bank of Kentucky</i> , 33 U.S. 118 (1834)	10
<i>Brown v Ohio</i> , 432 U.S. 161 (1977)	7,11
<i>Christian v State</i> , 513 P.2d 664 (Alaska 1973)	9
<i>Griffin v Illinois</i> , 351 U.S. 12 (1956)	10
<i>Ladner v United States</i> , 358 U.S. 169 (1957)	8
<i>Mill v State</i> , 585 P.2d 546 (Alaska 1978)	6,7
<i>New York ex rel. Bryant v Zimmerman</i> , 278 U.S. 63 (1928)	2
<i>People v Cline</i> , 83 Cal. Rptr. 246 (Cal. App. 1969)	7
<i>People v Wieckert</i> , 554 P.2d 688 (Colo. 1976)	7
<i>Peterson v State</i> , 562 P.2d 1350 (Alaska 1977)	9
<i>State v Arndt</i> , 553 P.2d 1328 (Wash. 1976)	8
<i>State v Cloutier</i> , 575 P.2d 996 (Ore.App. 1978)	7
<i>State v McQueen</i> , 582 P.2d 251 (Kan. 1978)	7
<i>State v Pia</i> , 514 P.2d 580 (Haw. 1973)	7
<i>Vigil v State</i> , 563 P.2d 1344 (Wyo. 1977)	7
<i>Wade v State</i> , 566 P.2d 275 (Okla.Crim. 1976)	7
<i>Whitton v State</i> , 479 P.2d 302 (Alaska 1970)	8

CONSTITUTIONAL PROVISIONS:

United States Constitution:	
Fourteenth Amendment	2
Alaska Constitution,	
Art. I, §7	1,4

STATUTES:

Alaska Statute 11.15.150	4
Alaska Statute 11.15.220	passim

RULES:

Alaska Appellate Rule 16(a)	4,10
-----------------------------------	------

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

ROBERT DEWAIN MILL,*Petitioner,*

v.

STATE OF ALASKA*Respondent.***RESPONSE OF THE STATE OF ALASKA
TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALASKA****JURISDICTION.**

The Petitioner, Robert Mill, urges that this Court has jurisdiction over his case by virtue of 28 U.S.C. § 1257(3); he claims that his case is one

where any...right, privilege, or immunity is specially set up or claimed under the Constitution...[of] the United States.

Mill argues that his due process rights were violated in two ways: first at trial, by the way in which the prosecutor argued the case to the jury; second on appeal, when his conviction was affirmed by only three of the five justices of the Alaska Supreme Court, on a 2 to 1 vote.

The State of Alaska recognizes that this second issue arose only after the Alaska Supreme Court's opinion was published; it is thus properly raised at this time. However, the State of Alaska submits that Mill did not raise or properly preserve the due process issue relating to the conduct of the trial.

In his appeal to the Alaska Supreme Court, Mill challenged the portion of the prosecutor's final argument that referred to three assaults. However, he referred to no provision of the Constitution in the two briefs he filed in the Alaska court. In fact, Mill never even uses the phrase "due process," although at one point he refers to "minimal notice and basic procedural fairness." (Appellant's opening brief, p. 39)

It is settled that a petitioner for writ of certiorari must have relied explicitly upon federal constitutional guarantees in the state court. Mere references to "due process" or "procedural fairness" will be taken as referring to the state constitutional guarantee (in this case, Alaska Constitution, Art. I, § 7), in the absence of explicit reliance on the federal Constitution. *New York Central & H. R. Co. v New York*, 186 U.S. 269 at 273 (1902); *New York ex rel. Bryant v Zimmerman*, 278 U.S. 63 at 67-68 (1928); *Bowe v Scott*, 233 U.S. 658 at 644-45 (1914).

Because Mill did not raise any violation of the federal Constitution, the Alaska Supreme Court did not address any such argument — or even directly construe due process rights under either federal or state constitutions. It was only after Mill had read Justice Burke's dissenting opinion that he re-framed his arguments to include explicit due process references. But still he cited both the federal Constitution *and* the Alaska constitution, without distinction, as the basis for his claim. See Mill's "Petition for Rehearing" to the Alaska Supreme Court, printed as Appendix B to his Petition for Writ of Certiorari, p. 33.

The Alaska court clearly still feels that no issue of due process under the Fourteenth Amendment was before them in Mill's case: the court refused Mill's request for a certificate of federal question (without dissent). See Appendix A.

For these reasons, the State of Alaska believes that Mill failed to properly raise his federal constitutional claim below, concerning the events at his trial.

Although the State wishes to contest the propriety of Mill's raising his federal claim at this late stage, the remainder of the State's brief will be written under the assumption that this Court will give active consideration to both of the issues raised by Mill in his Petition.

QUESTIONS PRESENTED.

1. Whether the Alaska Supreme Court denied the Petitioner due process of law, when it ruled that Petitioner's assaultive conduct constituted one criminal act, rather than three, and that the entire confrontation between the Petitioner and the victim in this case was included in the scope of the grand jury indictment.

2. Whether the Alaska Supreme Court denied the Petitioner due process of law, when only three of its five members participated in deciding the Petitioner's case, affirming his conviction by a vote of two to one.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The State of Alaska would add, to those constitutional provisions and rules already cited by the Petitioner, the following:

Alaska Constitution, Art. I, § 7, which provides in pertinent part:

Due Process. No person shall be deprived of life, liberty, or property without due process of law. ...

Alaska Rule of Appellate Procedure, Rule 16(a), which provides:

Quorum

(a) A quorum shall consist of a minimum of 3 justices or judges designated to sit on the supreme court.

STATEMENT OF THE CASE.

Mill was charged by grand jury indictment with the crime of shooting with intent to wound, a violation of AS 11.15.150; the indictment read:

...that on or about the 6th day of July, 1973, at or near Palmer,...Alaska, Robert Dewain Mill did unlawfully, feloniously, and maliciously shoot James Douglas Vincent with the intent to kill, wound, or maim him.

The incident referred to in the indictment occurred when Mill went to James Vincent's cabin to collect a \$1000.00 debt. Vincent at first refused to make payment, so Mill armed himself with a rifle and pistol from his truck and marched back to the cabin. (Tr. at 1031-34)

Mill laid the rifle across the window sill of the cabin and asked Vincent to step outside. (Tr. at 1035) Vincent complied, and as he emerged from the cabin onto the porch, Mill stood with his rifle trained on him. (Tr. at 1142)

Vincent approached Mill, ignoring two requests to stop his advance. At this juncture, Mill shot Vincent in the leg. (Tr. at 1044) Vincent fell off the cabin porch to the ground; Mill stepped down next to him and, emphasizing his request with

his rifle, asked Vincent to immediately make out a check payable to Mill for \$1000.00. (Tr. at 1046)

These events took place in continuous sequence, within the space of a minute or two, at the same location.

During final argument to the jury, the prosecutor was discussing the lesser included offense of assault with a dangerous weapon (AS 11.15.220). The prosecutor argued that Mill had committed three separate "ADW"s — (1) when Mill pointed the rifle at Vincent through the cabin window; (2) when Mill aimed his rifle at Vincent and shot him as both men stood on the porch; and (3) when Mill stood over the wounded Vincent and demanded his money.

The jury convicted Mill of the lesser included offense of assault with a dangerous weapon. On appeal to the Alaska Supreme Court, Mill argued that the prosecutor at trial had been right — Mill *had* committed *three* ADWs. But Mill argued that the grand jury indictment against him only encompassed one of these ADWs (the second one). Thus, it was error for the prosecutor to argue all three, and it was also error for the trial judge to submit the case to the jury without a special instruction directing them not to consider the "first" and "third" ADWs.

The Alaska Supreme Court rejected this "three ADW" contention. The court held that the confrontation between Mill and Vincent constituted a unitary criminal act — and therefore both the prosecutor and Mill were wrong in treating the incident as giving rise to three crimes.

The prosecutor's remarks, the court said, were error. But, under the facts of the case, the court held that the prosecutor's remarks could not have confused the jury or contributed to the verdict. (None of the salient facts was in issue. Mill admitted the entire occurrence on the stand, and relied on the theories

of self-defense [which would have exculpated him] and diminished capacity [which would reduce his crime to ADW].) Mill's conviction was therefore affirmed.

REASONS FOR DENYING THE WRIT.

A. THE ALASKA SUPREME COURT, AS A MATTER OF STATE LAW, DETERMINED THAT MILL'S ASSAULT ON VINCENT CONSTITUTED ONLY ONE CRIME, NOT THREE.

Mill makes two criticisms of the Alaska Supreme Court's ruling below. He claims that the court, by finding the prosecutor's remarks to be harmless error, has actually sanctioned a criminal trial where (1) Mill was convicted of an uncharged crime or (2) at the least it is impossible to ascertain if the jury considered the two uncharged ADWs¹ in reaching its verdict.

Mill's constitutional attack relies directly upon the following proposition:

The events leading up to the shooting of Vincent by appellant Mill took place in three separate stages, each one being distinct and not directly connected with the other.

(Mill's opening brief to the Alaska Supreme Court, p. 37)

It is Mill's characterization of the confrontation as "three separate...[and] distinct" events which allows him to argue that he was convicted of an uncharged crime: he construes the indictment against him as referring to only the second of three assaults.

¹ "ADW" is common parlance in Alaska when lawyers refer to the crime of "assault with a dangerous weapon," AS 11.15.200.

It is precisely this proposition — that there were three separate assaults committed by Mill — that the Alaska Supreme Court rejected in its decision in this case:

We view these events as a series of acts, in a short and continuous sequence, which amount to a unitary criminal episode.

(Mill v State, 585 P.2d at 552)

In truth, the record supports this conclusion. Mill's underlying purpose was to extract \$1000 from Vincent. To this end he ordered him outside on the cabin porch, assaulted and shot him when he emerged, and then forced Vincent to write out a check at gunpoint. There was no break in the action; it is fair to infer from Mill's own testimony that the whole confrontation was over in a minute or two.

The Alaska court viewed this as one continuous assault, with the greater crime of "shooting with intent to wound" arguably occurring in the midst of the action. Mill's conduct consisted of a series of assaultive acts against the same victim, at the same time and place, with a single underlying objective. It was thus held to be one assault with a dangerous weapon, not three.²

This Court has recognized that the characterization of a defendant's conduct as one crime, or as multiple crimes, is a matter of state law: *Brown v Ohio*, 432 U.S. 161 (1977). The *Brown* case involved a man who stole an automobile and drove it for nine days before being arrested in another city. He pleaded guilty to joyriding (a lesser included offense of auto theft),

² In general, other states have followed this policy. *Wade v State*, 566 P.2d 275 (Okla. Crim. 1976); *State v McQueen*, 582 P.2d 251 (Kan. 1978); see also *State v Pia*, 514 P.2d 580 (Haw. 1973). On the other hand, where multiple victims are affected by the same violent crime, courts are more likely to allow multiple convictions. *People v Wieckert*, 554 P.2d 688 (Colo. 1976); *Vigil v State*, 563 P.2d 1344 (Wyo. 1977); *People v Cline*, 83 Cal.Rptr. 246 (Cal.App. 1969); *State v Cloutier*, 575 P.2d 996 (Ore.App. 1978).

and then raised a double jeopardy claim when he was later prosecuted for the original theft of the car.

Final resolution of Brown's claim depended on whether the entire nine-day joyriding incident constituted a single crime or multiple crimes *under Ohio law*. See footnote 8 to the Court's opinion, 432 U.S. at 169-70.

The reasons why the Alaska court characterized Mill's conduct as one assault rather than three are found in footnote 4 to the court's opinion, 585 P.2d at 552. The court noted the acceptance of Mill's notion of three separate assaults would pose grave problems under Alaska's constitutional guarantee against double jeopardy — as interpreted in *Whitton v State*, 479 P.2d 302 (Alaska 1970). Mill's claim that his confrontation with James Vincent constituted three crimes would also violate the "rule of lenity" advocated by this Court in *Bell v United States*, 349 U.S. 81 (1955) and *Ladner v United States*, 358 U.S. 169 (1957). See also *State v Arndt*, 553 P.2d 1328 at 1334 (Wash. 1976).

Mill's contention that he might have been convicted of "other crimes" not charged in the indictment is based on his view of his conduct as constituting three assaults with a dangerous weapon. As a matter of state law, his conduct presents only one such crime. Therefore, the jury did not convict him of any other crime.

The Alaska court recognized that the prosecutor committed error by arguing the existence of "three" ADWs; but since these remarks did not invite the jury to consider any conduct outside of the crime which Mill actually committed, they could not conceivably have confused the jury or prejudiced the verdict.

There remains the further contention, impliedly raised by Mill in his Petition, that he was not adequately put on notice of

the conduct at issue in the indictment. Mill argues that the indictment returned against him concerns itself only with those few seconds when Vincent was shot in the leg, and not with the entire confrontation.

The State of Alaska has two responses to this argument. First, an indictment for a greater offense puts the defendant on notice of the possibility of lesser included offenses. Mill does not contend that assault with a dangerous weapon was an improper lesser offense included within a charge of shooting with intent to wound. Instead, he claims that he committed three assaults with his rifle, and the indictment only refers to one. The Alaska court has ruled that there were not three assaults underlying Mill's confrontation with Vincent — only one. Mill was thus put on notice of this one lesser included offense that arose from his argument with Vincent.

Second, the scope of notice given to an accused by an indictment is considerably broader under Alaska law than it is in many other jurisdictions. This stems from the right of a defendant in Alaska to transcripts of the grand jury proceedings. The Alaska Supreme Court has expressly addressed this issue in *Peterson v State*, 562 P.2d 1350 (Alaska 1977). See also *Christian v State*, 513 P.2d 664 (Alaska 1973).

In *Peterson, supra*, the Alaska court ruled that the notice given to a defendant must be considered not only in light of the indictment itself, but also in light of the grand jury proceedings (available to the defendant as a matter of right). Unfortunately, the grand jury proceedings in Mill's case were never made part of the record on appeal (see Table of Contents of the Record on Appeal, File 3: "Transcript"; see also Designation of Record on Appeal, R. at 148-49.) The State is therefore forced to confine itself to the observation that it is likely that the testimony before the grand jury included a

description of the entire confrontation between Mill and Vincent, from the time Mill first pointed his rifle into the cabin to the time Vincent wrote out the check — rather than simply a description of those few seconds surrounding the shooting.

For these reasons, Mill was not denied due process at trial. As a matter of state law, his conduct in confronting James Vincent with the rifle could only give rise to one lesser included offense of assault with a dangerous weapon. He was not convicted on the basis of other, uncharged crimes, since there were simply no other assaults for which he might have been charged. Mill was put on proper notice of the conduct at issue.

B. THE DECISION OF MILL'S CASE BY THREE MEMBERS OF THE COURT, ON A TWO TO ONE VOTE, DID NOT VIOLATE DUE PROCESS

A state can grant the right of appellate review under such terms as it deems proper, so long as all defendants are afforded the same rights without invidious discrimination. *Griffin v Illinois*, 351 U.S. 12 (1956).

The law of Alaska grants all defendants the right of appeal to the state supreme court; and in all cases, the court's quorum rule applies: three justices make a quorum. Rule 16(a), Alaska Rules of Appellate Procedure. Thus, the Alaska court did not deviate from its rules of procedure when it decided Mill's case on a two to one vote.

The authority cited by Mill, *Briscoe v Commonwealth's Bank of Kentucky*, 33 U.S. 118 (1834), does not purport to establish a constitutional rule that cases must always be decided by an absolute majority of a state supreme court. *Briscoe* merely establishes a *policy* of this Court in decisions affecting constitutional law.

For this reason, Mill was not denied due process when the Alaska Supreme Court affirmed his conviction on a vote of two to one.

CONCLUSION.

In summation, the State of Alaska contends:

(1) Mill failed to properly raise any federal constitutional claim below concerning the conduct of his trial.

(2) The determination of the Alaska Supreme Court that Mill's conduct could give rise to only one crime of assault with a dangerous weapon (and not three, as Mill claims) is a matter of state law, not federal law, under this Court's decision in *Brown v Ohio*, 432 U.S. 161 (1977). If Mill's conduct could constitute only one assault, then he was not convicted of "other" assaults, and the prosecutor's mischaracterization of the legal effect of Mill's actions was not prejudicial.

(3) The affirmance of Mill's conviction by the Alaska Supreme Court on a two to one vote was in conformity with the law of Alaska regarding the number of justices required to make up a quorum. There is no federal constitutional requirement to the contrary.

For these reasons, this Court should deny Mill's Petition for Writ of Certiorari to the Alaska Supreme Court.

Respectfully submitted this 2nd day of July, 1979.

AVRUM M. GROSS
ATTORNEY GENERAL OF ALASKA

By: David Mannheimer
David Mannheimer
Assistant Attorney General

**IN THE SUPREME COURT
OF THE STATE OF ALASKA**

ROBERT DEWAIN MILL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. 2692

Before: Connor, Boochever and Burke, Justices.
[Rabinowitz, Chief Justice, and Matthews,
Justice, not participating]

ORDER

On consideration of the application for certificate filed
April 30, 1979, and it appearing that the federal question
referred to was not in fact presented to this court,

IT IS ORDERED:

The application for certificate is denied.

Entered by direction of the court at Juneau, Alaska,
on May 23, 1979.

CLERK OF THE SUPREME COURT

ROBERT D. BACON

APPENDIX A